OGC HAS REVIEWED.

MEMORANDUM FOR: Director of Central Intelligence

SUBJECT : Agency Security Status

1. In connection with your draft letter on the security status of the Agency, the following comments may be useful:

a. Whether the Agency has a different status from all other executive agencies and is truly unique has not been definitively established, but a good many authorities have at least recognized certain unique aspects.

b. The Supreme Court has said, in the Curtiss-Wright and the Waterman Steamship Corporation cases, that the President, in whom the Constitution places sole jurisdiction in the field of foreign relations, has his confidential sources of information and of intelligence into which the courts may not inquire. This lumping of intelligence into the foreign relations field appears deliberate and is, therefore, I believe significant. The pertinent parts of these opinions read as follows:

> "The court below considered, and we think quite rightly, that it could not review such provisions of the order as resulted from Presidential direction. The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret." (Chicago and Southern Air Lines v. Waterman Steamship Corporation, 333 U. S. 103 (1948); the decision was 5 to 4.)

> "Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a

representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."

"It is quite apparent that if, in the maintenance of our international relations, embarrassment--perhaps serious embarrassment--is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results." (U. S. v. Curtiss-Wright Export Corporation, 299 U. S. 304, at 319-320 (1936).)

c. Another unexpected but useful authority, the Comptroller General, has also given us special status. Prior to our request for legislative authority, the Atomic Energy Commission had asked for unvouchered funds authority because of the secret nature of its work. The Comptroller General, Mr. Lindsay Warren, refused in the strongest terms to concur in the request. Yet shortly afterwards when we submitted our proposed legislation Mr. Warren wrote us an extremely thoughtful letter stating his opposition in principle to the grant of unvouchered funds authority but his conclusion that it was essential to the proper functioning of an intelligence agency in this day and age. Mr. Warren, as watch dog for the Congress, was, of course, closely in touch with congressional thought at this time.

d. It may be of interest to note that a review of all the legislation we can find in any way mentioning the Central Intelligence Agency reveals that there are 22 different times when CIA is exempted either from specific acts or general application of law.

e. In connection with the Seattle case, I believe our main contention might have been recognized if the executive branch of the Government had presented a united front. We

were claiming that the relation of an intelligence officer to his source is privileged, not the confidential information involved (there is some analogy here to lawyer and client and doctor and patient, which, of course, are relationships recognized as privileged in the interest of public policy). The judge recognized that this was a new development in the field of privilege and made it clear that he did not wish to commit himself on the point. He, therefore, gave the jail sentence for the purpose of forcing an appeal.

2. All this does not mean that the Agency is sacrosanct and obviously we have a heavy responsibility to the Congress. I believe we can rightly maintain, however, that Congress has a duty to recognize that there are unique aspects to this Agency and that the national interest requires that the Agency should be immune from certain otherwise standard practices, including the use of subpoena against Agency employees for the purpose of obtaining information about its activities.

/S/

LAWRENCE R. HOUSTON
General Counsel

1 Attachment - Excerpt from Opinion
of the Comptroller General

OGC:LRH:jeb

cc: OGC chrono
OGC subject (w/cc of att) "Security of Records and Information" #420